ONE CHEER FOR *HOBBY LOBBY*: IMPROBABLE ALTERNATIVES, TRULY STRICT SCRUTINY, AND THIRD-PARTY EMPLOYEE BURDENS

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In Burwell v. Hobby Lobby Stores, Inc.*, a five-Justice majority held that the contraception mandate of the Affordable Care Act failed to satisfy the strict scrutiny that the Religious Freedom Restoration Act (RFRA) requires of federal laws that burden religious exercise. It reasoned that the government could advance compelling interests in improving women's health and reducing gender disparities in health care without burdening for-profit religious liberty by extending a regulatory accommodation originally restricted to religious nonprofit businesses to closely held for-profit corporations.*

One dimension of the many legal challenges to the contraception mandate is how RFRA's strict scrutiny test should be understood and applied to claims for the exemption right it created. Hobby Lobby *posed three questions in this regard:*

1. When a court applies strict scrutiny under RFRA, must it find that a proposed alternative to religiously burdensome government action is financially, politically, or otherwise viable before it can count as an "available" less restrictive means of accomplishing the government's goals?

*2. Is the strict scrutiny required by RFRA the deferential test of pre-*Employment Division v. Smith *free exercise doctrine, or*

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the stringent test used in free speech, due process, and equal protection cases?

3. Does the need to avoid material burdens on those who do not believe or adhere to the exempted religious practice constitute a justification for denying exemptions that satisfies strict scrutiny under RFRA?

This Article is organized around the answers to an ironic version of these questions put forward by Hobby Lobby's counsel at oral argument. Part I shows that after Hobby Lobby*, the government's proof that it used the "least restrictive means" may now be refuted by suggestion of a less restrictive alternative that is not likely to be implemented or is otherwise not viable. Part II shows that in construing the strict scrutiny required by RFRA, the majority rejected the modest, even-handed balancing of the pre-*Smith *free exercise cases in favor of the robust and genuinely searching review of free speech, due process, and equal protection doctrine, and sketches the threatening implications of this move for the contraception mandate and other important workplace laws. Finally, Part III argues that while four Justices in* Hobby Lobby *would apparently allow religious exemptions to burden nonbeneficiary employees in most instances, five Justices recognized that avoiding such burdens is a sufficient justification for refusing exemptions, even under RFRA strict scrutiny.*

The Article concludes that avoiding material burdens on third-party employees marks a necessary and desirable boundary to the unlimited right to religious exemptions that otherwise would have emerged from Hobby Lobby*'s determinations that "less restrictive alternatives" need not be practically available and "strict scrutiny" under RFRA is the same searching review that usually ends in invalidation of laws in other constitutional contexts.*

Introduction: Three Disingenuous Arguments

Burwell v. Hobby Lobby Stores, Inc.[1] was one of the most anticipated decisions of the Supreme Court's 2013 Term, and for good reason: it was the Court's first look at a spate of challenges to the so-called "contraception mandate" (the "Mandate") of the Affordable Care Act (ACA).[2] Resolution of these challenges is likely to fix the course of religious liberty jurisprudence for a generation. A five-Justice majority held that the Mandate failed to satisfy the strict scrutiny that the Religious Freedom Restoration Act (RFRA)[3] requires of federal laws that burden religious exercise.[4] RFRA provides that persons exercising religion are to be excused from obeying a federal law that "substantially burden[s]" their religious exercise, unless the government satisfies strict scrutiny by proving that the burdensome law is the "least restrictive means" of furthering a "compelling government interest."[5] Recognizing closely held for-profit corporations like Hobby Lobby as "persons exercising religion,"[6] and finding that the Mandate "substantially burdened" Hobby Lobby's religious exercise,[7] the Court concluded that the government could advance its compelling interests in improving women's health and reducing gender disparities in healthcare costs[8] without burdening the religious liberty of closely held for-profit corporations, by extending to them a regulatory accommodation already in place for religious nonprofit employers.[9]

The meaning of the Free Exercise Clause was not at issue in *Hobby Lobby.* The Court rejected strict scrutiny in free exercise exemption cases in *Employment Division v. Smith*[10] and later confirmed that strict scrutiny far

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[1] 134 S. Ct. 2751 (2014).

[2] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.). The contraception mandate is introduced in amendments codified in 26 C.F.R. 54.9815-2713(a)(1)(iv) (Internal Revenue Service regulation), 29 C.F.R. 2590.715-2713(a)(1)(iv) (Department of Labor regulation), and 45 C.F.R. 147.130(a)(1)(iv) (Department of Health and Human Services regulation).

[3] Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

[4] *See Hobby Lobby*, 134 S. Ct. at 2759.

[5] *See* 42 U.S.C. § 2000bb-1 (2012).

[6] *Hobby Lobby*, 134 S. Ct. at 2767–75.

[7] *Id.* at 2775–79.

[8] *See id.* at 2779–80.

[9] *Id.* at 2781–82. Although the majority opinion merely assumed without deciding that the government had compelling interests in promoting women's health and reducing gender inequities in health care costs, *id.* at 2780, five Justices made clear their view that the government had carried its RFRA burden of proving the compelling nature of these interests. *See id.* at 2786 (Kennedy, J., concurring); *id.* at 2799–800 & 2800 n.23 (Ginsburg, J., joined by Breyer, Kagan & Sotomayor, JJ., dissenting).

[10] 494 U.S 872, 908 (1990).

exceeds the constitutional requirements of the Free Exercise Clause.[11] The general exemption right at stake in *Hobby Lobby* is not constitutional but statutory—a congressional directive for religious accommodation that the Constitution generally permits, but does not require. One dimension of the many legal challenges to the Mandate is how RFRA's statutory strict scrutiny test should be understood and applied to claims for the exemption right it created. *Hobby Lobby* shed light on the answers to three important questions about this issue that emerged during the oral argument of *Hobby Lobby* and continue to shape discussions about RFRA and the Mandate:

1. When a court applies strict scrutiny under RFRA, must it find that a proposed alternative to religiously burdensome government action is financially, politically, or otherwise viable for it to qualify as an "available" less restrictive means of accomplishing the government's goals?

2. Is the "strict" scrutiny required by RFRA the deferential test of pre-*Smith* free exercise doctrine or the much more stringent standard of review used in free speech, due process, and equal protection cases?

3. Does the obligation to avoid burdening those who don't believe or adhere to an exempted religious practice constitute a justification for denying RFRA exemptions that satisfies strict scrutiny?

These three questions were each placed in sharp relief by positions articulated by Hobby Lobby's counsel at oral argument. This Article accordingly unfolds in three parts, each of which states, in ironic form, a basic proposition argued by Hobby Lobby's counsel,[12] and then examines what the opinions in *Hobby Lobby* supplied in the way of responses.

Part I shows that the government's proof that it used the "least restrictive means" may now be refuted by the mere suggestion of a "less restrictive alternative," even if Congress is unlikely to enact that alternative or the alternative is otherwise impractical. Part II shows that the majority has rejected the evenhanded balancing of the pre-*Smith* free exercise cases in favor of a robust and genuinely strict scrutiny that is far more difficult for the government to satisfy, and sketches the threatening implications of this move for the Mandate and other important laws governing the workplace. Finally, Part III notes the inconsistency of the majority's apparent need to save Hobby Lobby from incurring additional expense to practice its religion, at the same time that it refused to recognize the injustice of imposing the expenses of practicing Hobby Lobby's religion on its employees. Part III also discusses the importance of the recognition by five Justices that the legal obligation to avoid burdening employees who do not benefit from

[11] *See* City of Boerne v. Flores, 521 U.S. 507, 532–36 (1997) (detailing how RFRA's statutory exemption regime significantly exceeds the substantive requirements of the Free Exercise Clause).

[12] These propositions are my assessment of what counsel's arguments amounted to, but they of course were not stated in this form by counsel.

Hobby Lobby's RFRA exemption is a sufficient justification for refusing exemptions, even under strict scrutiny.

Hobby Lobby's determination that RFRA requires genuinely strict scrutiny that is not satisfied if a less restrictive (though wholly impractical) alternative can be imagined basically creates a right to religious exemption for anyone who asks for one. Therefore, I conclude that the recognition by five Justices of the importance of avoiding the imposition of burdens on third-party employees is a critical part of RFRA strict scrutiny. By recognizing that courts may not order RFRA exemptions that impose significant burdens on third parties who do not believe or practice the exempted religion, these Justices defined a necessary constraint on the unlimited exemption right *Hobby Lobby* would have otherwise created.

I. The Government Should Pay for the Contraceptives Hobby Lobby Won't Pay for (Though Its Political Allies Will Walk Barefoot over Broken Glass to Keep This from Happening).

Since the Nixon administration, Title X of the Public Health Service Act has provided funding for a limited amount of contraceptives to lower-income women at little or no cost, through family planning organizations like Planned Parenthood.[13] At oral argument, Hobby Lobby's counsel invoked government funding generally and Title X in particular as less restrictive alternatives to the Mandate, insisting that Hobby Lobby employees could get the contraceptives Hobby Lobby refuses to cover from existing Title X organizations or a new government program.[14]

The *Hobby Lobby* majority essentially adopted counsel's argument. Though it did not mention Title X specifically, it suggested in dicta that RFRA requires the government to pursue direct distribution or funding of disputed contraceptives as a less restrictive alternative to imposition of the Mandate on objecting employers.[15] In the majority's view, the Mandate failed strict scrutiny under RFRA even though it was assumed to further compelling government interests in promoting women's health and reducing gender disparities in healthcare costs, because direct government supply of the contraceptives would afford the same access to contraceptives as the

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[13] U.S. Dep't Health & Human Services, Title X Family Planning, *archived at* http://perma.cc/77YA-X8MP.

[14] *See* Transcript of Oral Argument at 40, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356) ("I don't think there's anything sort of sacrosanct, if you will, about having the government pay for its preferred subsidy as a less restrictive alternative."); *id.* at 84 ("The government paying or a third-party insurer paying is a perfectly good least restrictive alternative."); *id.* at 86 ("[T]here's also Title X, which provides for contraception coverage, which is another least restrictive alternative . . . . [T]he most obvious least restrictive alternative is for the government to pay for their favorite contraception methods themselves.").

[15] *Hobby Lobby*, 134 S. Ct. at 2800–02.

Mandate without infringing on Hobby Lobby's religious anti-contraception beliefs.[16]

The majority went beyond dicta to hold that extension of the religious nonprofit accommodation to closely held for-profit employers who religiously object to the Mandate is a less restrictive alternative to imposing the Mandate on such employers.[17] This accommodation excuses from the Mandate those religious nonprofit employers not already categorically exempted as churches or religious congregations, such as religiously affiliated hospitals, universities, and social service organizations.[18] The accommodation requires the employer to complete and sign a government form that lists the religiously objectionable contraceptives that its health plan will not cover, and then to send the form to its third-party health insurer or, if self-insured, to its plan administrator.[19] The employer's health plan is then relieved of the obligation to cover the contraceptives to which it objects, which are instead supplied by the insurer or plan administrator at no additional cost to employees, dependents, or the objecting employer.[20]

A critical premise of the majority opinion, therefore, is that all female employees and dependents of Hobby Lobby would in fact receive the mandated contraception coverage if the government were to pursue either direct government funding of contraceptives to which employers object, or extension of the religious nonprofit accommodation to closely held for-profit businesses.[21] In either event, the majority flatly declared, "[t]he effect of the HHS-created accommodation on the women employed by Hobby

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[16] *Id.*

[17] *Id.* at 2803–06.

[18] 45 C.F.R. § 147.131(a)–(b) (2013).

[19] 45 C.F.R. § 147.131(b)(4)–(c)(1) (2013). Such organizations may also apparently obtain the exemption by advising the government of its religious objections by letter. *See* Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014).

[20] 45 C.F.R. § 147.131(c) (2013). In accordance with the Court's suggestion, the government recently initiated a rulemaking procedure designed to extend the religious nonprofit exemption to closely held for-profit corporations that object to the Mandate. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118 (proposed Aug. 27, 2014) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147). Self-insured employers fund their own insurance plans, but rarely pay claims or otherwise administer the plans themselves, contracting instead with the third-party insurance company to act as the "plan administrator" for the employer.

[21] The Court reasoned that extension of the religious nonprofit accommodation to closely held for-profit businesses does not impinge on the plaintiffs' religious belief that providing insurance coverage violates their religion, and it serves HHS's stated interests equally well. *Hobby Lobby*, 134 S. Ct. 2782–83 ("The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraception mandate, and there is none. Under the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to 'face minimal logistical and administrative obstacles,' because their employers' insurers would be responsible for providing information and coverage.") (quoting *id.* at 2802 (Ginsburg, J., dissenting)); *accord Wheaton Coll.*, 134 S. Ct. at 2807 ("Nothing in this interim order affects the ability of the applicant's employees and students to obtain, without cost, the full range of FDA approved contraceptives.").

Lobby . . . would be precisely zero," since "these women would still be entitled to all FDA-approved contraceptives without cost-sharing."[22] But expansion of the religious nonprofit accommodation to closely held corporations and direct government funding of contraceptives for employees and dependents of such corporations may not be feasible without a substantial increase in government spending. Title X, for example, does not cover all forms of contraception, the supply of contraceptives its limited funding permits is similarly limited, and it serves only lower-income women.[23] If the healthcare plans of Hobby Lobby and other closely held for-profit businesses are to be exempted from the Mandate on the theory that their employees and covered dependents could obtain disputed contraceptives from organizations receiving Title X grants, it is doubtful that such organizations could pick up the slack without a significant increase in Title X funding and an expansion of eligibility requirements.

Extension of the nonprofit accommodation to closely held for-profit businesses may also be financially implausible without a significant increase in funding. Supplying contraceptives is thought to be cost-neutral to third-party insurers who sell health plans paid for with employer premiums, because the costs such insurers incur in providing free contraceptives are almost certainly equal to or less than the prenatal and childbirth expenses they avoid by facilitating the increased use of contraception.[24] This is not the case, however, for plan administrators who operate health plans for self-insured employers; in that case the benefit of childbirth expenses avoided by contraceptives accrues to the employer who funds the plan rather than the administrator who runs it. Administrators will thus incur additional operating costs from providing contraceptives in the place of objecting employers, which will not be offset by the realization of savings elsewhere.[25]

The Mandate originally allowed administrators of self-insured plans funded by objecting religious nonprofit employers to claim a tax credit equal to the additional costs they will incur from providing no-cost contraception to the employees and dependents of such employers.[26] At the time this religious nonprofit accommodation was finalized, it was unlikely to require sig-

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[22] *Hobby Lobby*, 134 S. Ct. at 2760.

[23] Rachel Benson Gold, *Title X: Three Decades of Accomplishment*, 4 GUTTMACHER REP. ON PUB. POL'Y 1 (2001), *archived at* http://perma.cc/H3CB-LJNH.

[24] Studies have consistently shown that an insurer's cost of covering contraceptives in a health insurance plan is equal to or less than the cost of the prenatal care and childbirths that effective use of contraception avoids. *See* Frederick Mark Gedicks, *With Religious Liberty for All: A Defense of the Affordable Care Act's Contraception Coverage Mandate*, 6 ADVANCE: J. ACS ISSUE GROUPS 135, 145 & n.7 (2012) (summarizing the argument and data on cost neutrality).

[25] *See* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 352 (2014).

[26] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,882–86 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510, 2590; 45 C.F.R. pts. 147, 156).

nificant government funding because the number of claimants was expected to be relatively small: the percentage of persons employed by all nonprofit businesses is substantially less than 15% of total employment in the United States,[27] and religious nonprofit businesses and their employees constitute only a small percentage of all nonprofit businesses and employees.[28]

Hobby Lobby upended this expectation. Closely held for-profit businesses constitute about 90% of all employers in the United States,[29] and employ between one-half and four-fifths of all employees.[30] Thus, extending the religious nonprofit accommodation to closely held for-profit businesses, as the administration proposed in the wake of *Hobby Lobby*,[31] expands the universe of potential religious claimants and affected employees from a very small to a quite large percentage of all employers and employees. In light of this dramatic expansion of potential RFRA claimants and negatively affected employees, it can no longer be assumed that the required funding will be

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[27] *See, e.g.*, U.S. Census Bureau, Statistics of U.S. Businesses, NAICS Sectors, Legal Form of Organization (LFO) (2011), https://www.census.gov/econ/susb (on this page, click on "U.S., NAICS sectors, legal form of organization (LFO)" under the "U.S. and States" list to view cited statistics) (estimating that 15 million or 13.3% of the total 2010 workforce of approximately 113 million persons were employed by nonprofit organizations); Lester M. Salamon et al., *Holding the Fort: Nonprofit Employment During a Decade of Turmoil*, 39 Johns Hopkins Nonprofit Bull. 1, 2 (2012) (reporting that in 2010, nonprofit organizations accounted for 10.1% of private employment in the United States, amounting to 10.7 million employees); Molly F. Sherlock & Jane G. Gravelle, Cong. Research Serv., R40919, An Overview of the Nonprofit and Charitable Sector 4 (2009), *archived at* http://perma.cc/U2EY-DU7B (estimating nonprofit employment at approximately 10% of the total workforce).

[28] Figures showing the proportion of religious nonprofits to all nonprofit businesses are difficult to find. In the healthcare industry, however, religious nonprofit businesses—e.g., religiously affiliated hospitals—constitute approximately 14% of all nonprofit healthcare businesses. Am. Civil Liberties Union, Miscarriage of Medicine: The Growth of Catholic Hospitals and the Threat of Reproductive Health Care (2013), *archived at* http://perma.cc/5YVN-A2EF. It seems reasonable to assume that the proportion of all religious nonprofit businesses to all nonprofit businesses is comparable.

[29] There are approximately seven million incorporated businesses in the United States, of which 90% are thought to be closely held. Venky Nagar et al., Governance Problems in Closely Held Corporations 1 (Oct. 2009) (unpublished manuscript), *archived at* http://perma.cc/386F-SCQ7; *see also* Jillian Berman, *The Hobby Lobby Decision Could Affect Millions of Workers*, Huffington Post (June 30, 2014), http://www.huffingtonpost.com/2014/06/30/hobby-lobby-closely-held_n_5545064.html, *archived at* http://perma.cc/99X9-U4JP; Aaron Blake, *A LOT of People Could be Affected by the Supreme Court's Birth Control Decision—Theoretically*, Wash. Post: The Fix Blog (June 30, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/30/a-lot-of-people-could-be-affected-by-the-supreme-courts-birth-control-decision, *archived at* http://perma.cc/N3JR-5PAS; Allison Griswold, *How Many People Could the* Hobby Lobby *Ruling Affect?*, Slate (June 30, 2014), http://www.slate.com/blogs/moneybox/2014/06/30/hobby_lobby_supreme_court_ruling_how_many_people_work_at_closely_held_corporations.html, *archived at* http://perma.cc/ASN9-JXB7.

[30] *Compare* Nagar et al., *supra* note 29, at 1 (estimating that closely held corporations employ 52% of workforce), *with* Berman, *supra* note 29 (reporting estimate that such corporations employ 79% of workforce).

[31] *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118 (proposed Aug. 27, 2014) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

minimal or otherwise insignificant. Assertions that this extension will "cost the government nothing to implement" are thus unfounded.[32]

Funding for direct government coverage of contraceptives or a substantially larger exchange-tax credit is not politically viable, and it is disingenuous to suggest otherwise. Religious and political conservatives have been trying to defund federal contraception-coverage programs since the Reagan administration,[33] with considerable success: Title X funding, for example, has been cut nearly in half in real terms since inception of the program in 1974.[34] Many of the same persons and groups are also actively committed to defunding the entire ACA[35] and filed amicus briefs in support of Hobby Lobby's argument that for-profit businesses are entitled to a RFRA exemption from the Mandate under RFRA.[36] These persons and groups are unlikely

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[32] *See, e.g.*, Marc DeGirolami, *The Deeper Meaning in the* Hobby Lobby *Opinion*, LIBRARY OF LAW AND LIBERTY (July 1, 2014), http://www.libertylawsite.org/2014/07/01/the-deeper-meaning-in-the-hobby-lobby-opinion, *archived at* http://perma.cc/3JA8-3A2B.

[33] *See, e.g.*, Pam Belluck & Emily Ramshaw, *Women in Texas Losing Options for Health Care in Abortion Fight*, N.Y. TIMES, Mar. 7, 2012, *archived at* http://perma.cc/LP4S-FVAK (reporting that all four candidates then remaining in the 2012 Republican primary, including Mitt Romney and Rick Santorum, favored defunding Title X and eliminating Planned Parenthood access to federal funds); Erik Eckholm, *Planned Parenthood Financing Is Caught in Budget Feud*, N.Y. TIMES, Feb. 17, 2011, *archived at* http://perma.cc/MB9Z-AXBE (reporting that the Republican-controlled House passed a bill to entirely defund Title X); Vicki Evans, *Taxpayer Funding and Planned Parenthood*, U.S. CONF. CATHOLIC BISHOPS BLOG (Apr. 1, 2011), http://www.usccb.org/issues-and-action/human-life-anddignity/abortion/taxpayer-funding-and-planned-parenthood.cfm, *archived at* http://perma.cc/Y54N-CCWL (arguing in support of proposed defunding of Title X); Sarah Kliff, *Romney Takes on Family Planning*, WASH. POST: WONKBLOG (Nov. 4, 2011), http://www.washingtonpost.com/blogs/wonkblog/post/romney-takes-on-family-planning/2011/11/04/gIQAQBcrmM_blog.html, *archived at* http://perma.cc/5JSY-BTTW (reporting that during the 2012 Republican primary Mitt Romney proposed to eliminate Title X funding); NAT'L FAMILY PLANNING & REPROD. HEALTH ASS'N, THE TURNING POINT: FEDERAL LEGISLATIVE AND REGULATORY ACTION ON SEXUAL AND REPRODUCTIVE HEALTH IN 2012 6–11 (2012), *archived at* http://perma.cc/H95Q-KV96 (reporting Republican efforts to entirely defund Title X, and eventual cuts to Title X funding). *See generally Title X: America's Family Planning Program*, PLANNED PARENTHOOD ADVOCATES OF VA, INC. (2004), http://www.ppav.org/title_x_america_s_family_planning_program, *archived at* http://perma.cc/WX95-ZYN5.

[34] *See, e.g.*, PLANNED PARENTHOOD, *supra* note 33 (noting that as of February 2001, Title X funding had been reduced to 60% of its inflation-adjusted 1974 funding).

[35] *See, e.g.*, Lori Montgomery & Philip Rucker, *House Passes GOP Spending Plan that Defunds Obamacare*, WASH. POST, Sept. 20, 2013, *archived at* http://perma.cc/KS9G-ZXHZ.

[36] Amici filing briefs in support of *Hobby Lobby* were overwhelmingly composed of Republican members of Congress who are publicly committed to repealing or defunding the ACA (e.g., Senators Ted Cruz (R-Tex.), Lindsay Graham (R-S.C.), Orrin Hatch (R-Utah), Mike Lee (R-Utah), Mitch McConnell (R-Ky.), and David Vitter (R-La.)); Roman Catholic, evangelical Protestant, and other religiously conservative clerics, leaders, scholars, and organizations (e.g., Prof. Gerard V. Bradley, the Family Research Council, Prof. Richard Garnett, Dr. Robert George, the National Association of Evangelicals, Dr. Daniel Philpott, the Southern Baptist Seminary, The Church of Jesus Christ of Latter-day Saints, the U.S. Conference of Catholic Bishops, and Dr. Christopher Wolfe); and politically conservative think tanks and public interest firms (e.g., the Cato Institute, the Heritage Foundation, the Pacific Legal Foundation, and the Rutherford Institute). *See Burwell v.*

to increase funding for Title X or to fund any other government program designed to supply free contraceptives to female employees and dependents of for-profit employers exempted from the Mandate. Unsurprisingly, the aftermath of *Hobby Lobby* has seen no letup in conservative efforts to defund Title X and the ACA, and to block or reduce direct government supply of contraceptives.[37] No conservative persons or organizations have stepped up to endorse an increase in Title X or other government funding to fill the potential contraception coverage gap created by opening the religious nonprofit accommodation to closely held secular for-profits, and religious conservatives continue to attack the nonprofit accommodation itself.[38]

If direct government coverage or extension of the existing religious nonprofit accommodation requires additional funding that is unlikely to be approved, then it is questionable that either of these alternatives is truly available.[39] The political realities blocking government funding of contraception serve as stark reminders that whatever lawyers or judges might conjure up as hypothetical alternatives, in the real world where women actually live, an increase in Title X funding or the creation of any other such program to fill the gap caused by RFRA exemptions is politically dead on arrival in Congress. RFRA exemptions for religiously objecting employers therefore threaten to force female employees and the covered female dependents of all employees to pay out of pocket for something that the government has compelling interests in making available through employer health plans at no additional cost. The "alternative" to the Mandate proposed by the *Hobby Lobby* majority exists only in the imaginations of the Justices who suggested it,[40] and risks leaving the government unable to advance its admittedly com-

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Hobby Lobby Stores, Inc., SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/sebelius-v-hobby-lobby-stores-inc, *archived at* http://perma.cc/E7EB-3QVY (providing links to, inter alia, all amicus briefs filed in support of *Hobby Lobby* and other linked cases).

[37] *Cf. Republicans Block Bill to Restore Contraception*, N.Y. TIMES, July 16, 2014, *archived at* http://perma.cc/ZFC6-WZAU (successful filibuster of Senate bill supported by fifty-three Democrats and three Republicans that would have expressly excepted contraception mandate from RFRA).

[38] *See* Thomas C. Berg, *RFRA Worked in Hobby Lobby; What's Next?*, CORNERSTONE BLOG (July 2, 2014), http://berkleycenter.georgetown.edu/cornerstone/hobby-lobby-the-ruling-and-its-implications-for-religious-freedom/responses/rfra-worked-in-hobby-lobby-what-s-next, *archived at* http://perma.cc/FC4P-X7R4 (observing that some religious nonprofits continue to attack the legality of the accommodation); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 91 (2015) ("Hobby Lobby and others may well litigate under RFRA against [extension of the religious nonprofit accommodation to closely held for-profits] if it is ultimately provided. They might assert that they are substantially burdened by any arrangement that makes them cooperate . . . in the provision of coverage.").

[39] *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2802 n.26 (2014) (Ginsburg, J., dissenting) (noting that "in context of First Amendment Speech Clause challenge to a content-based speech restriction, courts must determine 'whether the challenged regulation is the least restrictive means among *available*, effective alternatives'") (quoting Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666 (2004)).

[40] *See* Lupu, *supra* note 38, at 89 ("It is unlikely in the extreme that Congress will appropriate funds to pay for the various contraceptives to which Hobby Lobby and other

pelling goals of protecting women's health and reducing gender disparities in healthcare costs whenever government funding is required.

It takes more than a little chutzpah, then, for Hobby Lobby and other religious conservative businesses—not to mention the *Hobby Lobby* majority itself—to suggest either direct government funding or expansion of the religious nonprofit accommodation as less restrictive alternatives to application of the Mandate to for-profit corporations, when their religious and political allies have been doing everything possible to kill Title X and the entire ACA, and to expand the religious nonprofit accommodation. If their position is that female Hobby Lobby employees and dependents must depend on direct government funding to receive the benefits of the Mandate, then they should have the honesty to admit that those women are not going to receive those benefits because Congress will almost certainly not appropriate the money to fund them—that the costs to women employees will not be "precisely zero," because it is thought more important to protect the religious "conscience" of a multi-billion dollar corporation than the government's compelling interests in women's health and gender equity.

II. The Government Can't Possibly Satisfy Strict Scrutiny Here (But It Easily Can Everywhere Else).

As I have indicated, RFRA provides that believers are to be excused from the obligation to obey religiously burdensome federal laws, unless the government satisfies strict scrutiny by proving that the burden is the "least restrictive means" of furthering a "compelling government interest."[41] At oral argument, Hobby Lobby's counsel maintained that the Mandate cannot possibly satisfy strict scrutiny, yet he also dismissed suggestions that exempting Hobby Lobby from the Mandate would open the floodgates to RFRA exemptions from other important government laws. One just needs to "trust the courts" to make reasonable balances, he urged.[42] The Court did not need to worry about exemptions from child vaccination requirements, minimum wage laws, payment of social security and other taxes, or myriad other laws regulating public health, the for-profit workplace, or access to benefits—all of these, counsel implied, are necessary to the advancement of

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firms object on religious grounds, so this alternative may be theoretically adequate but politically impossible."); *see also* Paul Stancil, *Congressional Silence and the Statutory Interpretation Game*, 54 Wm. & Mary L. Rev. 1251, 1263–65, 1324, 1332–36 (2013) (arguing that the Supreme Court will often take advantage of the high transaction costs of enacting federal legislation to engage in self-interested or aggressive interpretations of federal statutes without fear of congressional override).

[41] 42 U.S.C. § 2000bb-1 (2012).

[42] Transcript of Oral Argument at 14, *Hobby Lobby,* 134 S. Ct. 2751 (Nos. 13-354 & 13-356) ("[L]ook, you've got to trust the courts; just because free exercise claims are being brought doesn't mean that the courts can't separate the sheep from the goats.") (loosely paraphrasing from Justice O'Connor's separate opinion in *Employment Division v. Smith*, 494 U.S. 872 (1990)).

compelling government goals and thus would never be subjected to exemptions like the one sought by Hobby Lobby.[43]

But, if RFRA's strict scrutiny test was so hard to satisfy in the case of the Mandate, why should it be so easy to satisfy in every other case the Justices could imagine? Or, more to the point, if vaccinations, minimum wages, and social security pensions are so obviously the least restrictive means of advancing compelling government interests in protecting public health, avoiding worker exploitation, and ensuring subsistence incomes for the elderly, as counsel insisted, why wasn't the Mandate the least restrictive means of furthering the compelling goals of promoting women's health and workplace equality and reducing gender disparities in the cost of health care?

The Mandate would almost certainly have passed muster under the pre-*Smith* exemption doctrine that RFRA purported to restore. Whatever its formal expression, the scrutiny given to religiously burdensome government actions prior to *Smith* was exceedingly deferential.[44] Beginning with the birth of the free exercise exemption regime in 1963[45] and running to its general demise in 1990,[46] the Court considered at least fourteen exemption claims under the Free Exercise Clause, but granted only five (four of which involved denial of unemployment compensation benefits).[47] One study has

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[43] *See, e.g.*, *id.* at 5 ("I do think in the context of vaccinations, the government may have a stronger compelling interest than it does in this context because there are notions of herd immunity and the like that give the government a particularly compelling interest in trying to maximize the number . . . [cut off]."); *id.* at 14 ("[T]he parade of horribles that the government offers you ought to sound familiar, because if you look at that parade of horribles—Social Security, minimum wage, discrimination laws, compelled vaccination—every item on that list was included in Justice Scalia's opinion for the Court in *Smith*."); *id.* at 21 ("[United States v. Lee] does stand for the proposition that in the tax context, it's going to be very hard for somebody to bring a claim that satisfies even the demanding compelling interest, least restrictive alternative test."); *id.* at 85 ("I think *Lee* says that taxes are different and not all exemptions are created equal, because some exemptions undermine the compelling interest.").

[44] *See, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1271, 1312 (2007) (concluding that the pre-*Smith* free exercise cases are examples of the weakest version of strict scrutiny, which "amounts to little more than weighted balancing, with the scales tipped slightly to favor the protected right"); Stephen Pepper, *The Conundrum of the Free Exercise Clause: Some Reflections on Recent Cases*, 9 N. KY. L. REV. 265, 289 (1982) (describing pre-*Smith* scrutiny as asking whether there is "a real, tangible . . . non-speculative, non-trivial injury to a legitimate, substantial state interest"); *see also* James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 102 (1991) ("[S]ometimes the government wins and sometimes the claimant wins.").

[45] *See* Sherbert v. Verner, 374 U.S. 398 (1963).

[46] *See Smith*, 494 U.S. 872.

[47] *Compare* Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990) (denying religious organization exemption from state taxes on sales of Bibles and other religious literature), Hernandez v. Comm'r, 490 U.S. 680 (1989) (denying taxpayers exemption from limit on tax deduction for donations to their church), Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439 (1988) (denying Native American claimants relief from government construction of road on government property deemed sacred by claimants), O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (denying Muslim prison inmates exemption necessary for them to meet in weekly congregational service), Bowen v. Roy,

similarly reported that between 1980 and 1990 the federal appellate courts rejected an astounding 87% of free exercise exemption claims.[48] Even under RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA),[49] the federal courts ruled against the claimants over 70% of the time prior to *Hobby Lobby*.[50] Whether rooted in a religious exemption statute or the Free Exercise Clause itself, the judicial scrutiny applied to religious exemption claims was "strict in theory but feeble in fact."[51]

Until now. *Hobby Lobby* left little doubt that RFRA now imposes a genuinely "strict" standard of review entailing serious and searching scrutiny of religiously burdensome government actions. RFRA's "least restrictive means" standard, the majority declared, is a "stringent" and "exceptionally demanding" test,[52] which could hardly describe its pre-*Smith*

476 U.S. 693 (1986) (denying federal welfare benefits applicant exemption from requirement that he obtain and furnish a social security number for his daughter), Goldman v. Weinberger, 475 U.S. 503 (1986) (denying orthodox Jewish military officer exemption from uniform requirement that would preclude him from wearing yarmulke), Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985) (denying religious organization exemption from minimum wage and reporting provisions of Fair Labor Standards Act), United States v. Lee, 455 U.S. 252 (1982) (denying Amish employer exemption from requirement that he pay social security taxes on employees), *and* Gillette v. United States, 401 U.S. 437 (1971) (denying claimant who religiously objected to "unjust" war rather than all wars exemption from draft), *with* Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989) (granting unemployment compensation benefits to appellant who refused to work on Sundays due to his sincerely held religious beliefs even though he was not a member of a recognized religion), Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136 (1987) (granting unemployment compensation benefits to appellant who refused to work on her Sabbath), Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981) (granting unemployment compensation benefits to appellant who terminated his job because his religious beliefs forbade him from participating in the production of war materials), Sherbert v. Verner, 374 U.S. 398 (1963) (granting persons resigning or dismissed from employment for religiously motivated refusals to work on certain days or at certain duties held exempt from "availability for work" condition for receipt of unemployment benefits), *and* Wisconsin v. Yoder, 406 U.S. 205 (1972) (granting Amish parents exemption from state law requiring school attendance to age sixteen).

[48] James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1416–17 (1992).

[49] Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc–2000cc-5 (2012).

[50] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 860, 861 (2006) (surveying fifty-four statutory and four constitutional cases between 1990 and 2003 that applied strict scrutiny to government denial of a religious exemption).

[51] Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 447 (1994) (describing the pre-*Smith* exemption cases). *Cf.* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (arguing that strict scrutiny is "'strict' in theory, but fatal in fact"). For an incisive account of the marginal impact that RFRA and other exemption statutes had exerted on religious liberty claims before *Hobby Lobby*, see Lupu, *supra* note 38, at 48–75.

[52] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014) (citing City of Boerne v. Flores, 521 U.S. 507, 532–34 (1997)); *see also id.* at 2785 (Kennedy, J., concurring) ("As the Court notes, under our precedents, RFRA imposes a 'stringent test.'") (quoting *City of Boerne*, 521 U.S. at 533).

application. The majority further suggested that this standard may even obligate the government to create entirely new programs that require significant additional expenditures, to avoid burdening religious exercise.[53] It went on to hold that the religious nonprofit accommodation is a less restrictive alternative that can be extended to closely held for-profit businesses like Hobby Lobby, supposedly ensuring the mandated contraception coverage to female employees and covered dependents while accommodating Hobby Lobby's religious objections.[54]

When it struck down RFRA as it applied to the states, the Court called strict scrutiny under RFRA "the most demanding test known to constitutional law."[55] This suggested that RFRA strict scrutiny is now as demanding as the strict scrutiny applied under the Due Process, Equal Protection, and Speech Clauses, which the government usually cannot satisfy.[56] At any rate, the RFRA strict scrutiny deployed in *Hobby Lobby* is clearly not the deferential version of strict scrutiny that inhabits the pre-*Smith* free exercise cases.

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[53] *Hobby Lobby*, 134 S. Ct. at 2780 (maintaining that a less restrictive means of accomplishing the Mandate's goals "would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health insurance policies due to their employers' religious objections"); *see also id.* at 2781–82 (reading RFRA as requiring the government "to expend additional funds to accommodate citizens' religious beliefs" in certain cases, and rejecting the government's argument that it cannot be required to make relatively small expenditures to eliminate religious burdens caused by the pursuit of government goals). As I argued in Part I, there is a serious question about whether this alternative is really "available."

[54] *Id.* at 2763. It is anticipated that the religious nonprofit accommodation will be cost-neutral for insurers but not for administrators. The Mandate thus contains a tax credit and other means for insurers (if they in fact incur costs) and administrators to recoup any costs without directly or indirectly charging the exempted religious nonprofits. *See* Gedicks & Van Tassell, *supra* note 25, at 350–52. *See also supra* text accompanying notes 25–26.

[55] *City of Boerne*, 521 U.S. at 524. *City of Boerne* also mistakenly declared that RFRA's "less restrictive means" test was not present in the pre-*Smith* accommodation jurisprudence, and thus erred in stating that RFRA constituted a doctrinal addition to, rather than a restoration of that jurisprudence. *Id.* at 535. This was demonstrably wrong at the time the Court declared it. In dismissing the state's argument that denial of unemployment insurance to Sabbath observers was necessary to avoid fraudulent claims and employee-scheduling difficulties, *Sherbert v. Verner* expressly assumed that less restrictive means analysis was a necessary part of the free exercise exemption balance. *See* 374 U.S. 398, 407 (1963) ("[E]ven if the possibility of spurious claims did threaten to dilute the [unemployment insurance] fund and disrupt the scheduling of work, it would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."). *United States v. Lee* subsequently employed less restrictive means analysis to deny the exemption claim in that case. *See* 455 U.S. 252, 259–61 (1982) (concluding that claimant's payment of Social Security taxes on his employees was necessary to the funding of Social Security benefits, notwithstanding the burden this placed on his religious beliefs). The *Hobby Lobby* majority unfortunately replicated *City of Boerne*'s error. *See* 134 S. Ct. at 2767 n.18 (reaffirming *City of Boerne*'s declaration that RFRA went beyond pre-*Smith* jurisprudence "by imposing a least-restrictive-means test").

[56] Winkler, *supra* note 50, at 815 (reporting that government satisfied strict scrutiny in 33% of freedom of association cases, 27% of suspect-class discrimination cases, 24% of fundamental rights cases, and 22% of freedom of speech cases).

There is, therefore, no reason to credit the assurances of Hobby Lobby's counsel—or, for that matter, those of the *Hobby Lobby* majority—that the government will be able to satisfy strict scrutiny in most cases involving important government laws or benefits.[57] Simply "trusting the courts" to make reasonable balances, as counsel suggested,[58] was an option only under the pre-*Smith* deferential form of "strict" scrutiny. After *Hobby Lobby*, scrutiny is now truly "strict": the government is required to prove that important federal laws providing critical benefits and protections in the workplace must satisfy a rigorous constitutional test whenever they are applied to objecting believers. It is easy to imagine employer claims to an exemption from covering all contraceptives in a healthcare plan (not just a few) and other prescriptions and procedures (not just contraceptives); RFRA might even be used to justify employer exemption from prohibitions on gender, religion, or sexual orientation discrimination—prohibitions the majority studiously ignored in emphasizing the purportedly limited reach of its holding.[59]

Hobby Lobby's muscular interpretation of RFRA strict scrutiny is more than a little ironic given that Congress passed the Religious Freedom Restoration Act precisely to *restore* the abandoned, deferential pre-*Smith* free exercise jurisprudence, as the statute originally and expressly provided,[60] and as its congressional proponents were at pains to assure RFRA skeptics.[61] But

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[57] *See supra* notes 42–43 and accompanying text; *see also Hobby Lobby*, 134 S. Ct. at 2783 (declaring that the government could satisfy strict scrutiny in response to exemption claims from immunization requirements and racial anti-discrimination laws).

[58] *See supra* note 42.

[59] *See, e.g.*, Berg, *supra* note 38 (suggesting that after *Hobby Lobby* small businesses might obtain RFRA exemptions from providing services at same-sex weddings "when many alternative providers are at hand"); *cf.* Molly Ball, Hobby Lobby *is Already Creating New Religious Demands on Obama*, ATLANTIC, July 2, 2014, *archived at* http://perma.cc/GR3T-BPRS (reporting on faith leaders who urged that *Hobby Lobby* requires or permits expansion of religious exemptions from proposed executive order banning LGBT discrimination by federal contractors). *But see* Ira C. Lupu & Robert Tuttle, Hobby Lobby *in the Long Run*, CORNERSTONE BLOG (July 1, 2014), http://berkleycenter.georgetown.edu/cornerstone/hobby-lobby-the-ruling-and-its-implications-for-religious-freedom/responses/hobby-lobby-in-the-long-run, *archived at* http://perma.cc/5CSL-GKR9 (suggesting that exemption claims in other areas are unlikely to succeed: "Although it is true that for-profit firms can now bring RFRA claims, most claims by for-profit employers to escape their legal obligations will not fare so well. For example, the government has very strong interests in combating employment discrimination, and the government has no obvious alternative means to accommodate the interests of employees in not being the victims of discrimination.").

[60] 42 U.S.C. § 2000bb-2(4) (1994) (defining "exercise of religion" in terms of the Court's prior free exercise decisions); *see also* 42 U.S.C. § 2000bb(a)(5) (finding that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests").

[61] *See, e.g.*, 103 CONG. REC. H2356 (daily ed., May 11, 1993), *archived at* http://perma.cc/EE3D-8SGL (describing one purpose of original RFRA bill H.R. 1306 as "to restore the compelling interest test as set forth in Federal court cases before *Employment Division of Oregon v. Smith*"); 103 CONG. REC. S14352 (daily ed., Oct. 26, 1993) (remarks of Sen. Kennedy, D-Mass.), *archived at* http://perma.cc/C5EW-6J7U ("The

RFRA's name and legislative history notwithstanding, the Court has severed the statute from its pre-*Smith* antecedents,[62] thereby converting RFRA from the statutory restoration of an evenhanded balancing test into a doctrinal revolution that has vested in federal judges the authority to craft a wholly new and demanding religious exemption jurisprudence.[63]

III. Hobby Lobby Shouldn't Have to Pay Extra to Practice Its Religion (But It's Okay to Make Its Employees Pay for It).

The ACA regulations do not actually create a legal requirement that employer health plans cover FDA-approved contraceptives and related services. The regulations provide only that if an employer offers a health plan to its employees, that plan must cover contraceptives.[64] Employers with more than fifty employees who fail to offer a health plan must pay an annual tax of $2,000 per employee, and their employees are then eligible to purchase health insurance directly on the federal or relevant state ACA exchange, with qualifying subsidies.[65]

Two thousand dollars per employee is far less than any employer's annual cost of providing health insurance to its employees and their covered dependents.[66] Hobby Lobby, therefore, could have avoided providing the contraceptives to which it objects by eliminating its health insurance plan and paying the "no-plan tax" for each of its roughly 23,000 employees,[67]

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amendment we will offer today is intended to make it clear that the pre-*Smith* law is applied under the RFRA in determining whether Government action burden [sic] under the freedom of religion must meet the test."); 103 Cong. Rec. S14468 (daily ed., Oct. 27, 1993) (remarks of Sen. Feingold, D-Wis.), *archived at* http://perma.cc/5VPB-RRW2 ("For nearly 20 years the compelling interest standard has proved to be sufficiently flexible to strike an appropriate balance between the free exercise of religion and the functions of Government . . . .").

[62] *See Hobby Lobby*, 134 S. Ct. at 2772 (rejecting the argument that RFRA "did no more than codify this Court's pre-*Smith* Free Exercise Clause precedents").

[63] *See, e.g.*, Micah Schwartzman et al., *The New Law of Religion:* Hobby Lobby *Rewrites Religious-Freedom Law in Ways that Ignore Everything that Came Before*, Slate (July 3, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html, *archived at* http://perma.cc/QAR5-368V.

[64] Marty Lederman, Hobby Lobby *Part III—There is no "Employer Mandate,"* Balkinization (Dec. 16, 2013), http://balkin.blogspot.com/2013/12/hobby-lobby-part-iiitheres-no-employer.html, *archived at* http://perma.cc/XQ7Q-T9A8.

[65] *Id.*

[66] Kaiser Family Found. & Health Research & Educ. Trust, Employer Health Benefits—2013 Annual Survey § 6, Exs. 6.3 & 6.4, at 74–75 (2013), *archived at* http://perma.cc/38LN-88FD (reporting the average annual health insurance contribution by employers supplying health insurance during 2013 was $4,885 per employee for single coverage and $11,786 for family coverage).

[67] *Hobby Lobby* was litigated on the premise that Hobby Lobby has approximately 13,000 employees, which apparently was the correct figure when it filed its action for preliminary injunction in 2012. *See* Hobby Lobby Stores, Inc. v. Sebelius, 743 F.3d 1114, 1125 (10th Cir. 2013) (en banc), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134

who instead would have purchased subsidized health insurance on the health insurance exchanges. Forty-six million dollars is surely a lot of money, but it is dwarfed by the expenses Hobby Lobby currently incurs to maintain a health insurance plan for all of its employees and their many dependents.[68]

At oral argument, however, Hobby Lobby's counsel complained bitterly at the unfairness of suggestions by Justices Kagan, Kennedy, and Sotomayor that Hobby Lobby could both honor its religious beliefs and comply with the Mandate by eliminating its health insurance plan and paying the no-plan tax: Hobby Lobby would not only have to pay the tax, counsel protested, it would also have to increase wages to attract employees in the absence of a health insurance benefit.[69] This would increase its costs of doing business and that, he urged, would constitute an unacceptable burden on its religious exercise under RFRA.[70] He had literally nothing to say, however, about the unfairness of shifting that burden to Hobby Lobby's employees.

S. Ct. 2751 (2014). It has since grown to an estimated 23,000 employees. *See America's Largest Private Companies,* FORBES, (Dec. 2013) http://www.forbes.com/companies/hobby-lobby-stores, *archived at* http://perma.cc/U55H-X5MF.

[68] Based on the Kaiser Foundation Survey averages, *see supra* note 66, Hobby Lobby would pay approximately $112.4 million annually for average single-person coverage of all employees (23,000 employees x $4,885), and approximately $271.1 million for average family coverage of all employees (23,000 employees x $11,786). Of course, the actual expense would vary, depending upon whether benefits covered by its plan are below or above the average coverage, as well as upon the mix of employees electing single, family, and no coverage. Nevertheless, there can be little doubt that the total cost of Hobby Lobby's health plan expenses substantially exceeds the $46 million "no-plan" tax it would pay if it did not offer a health plan.

Indeed, the numbers are so compelling that Standard & Poor's estimates that in less than a decade 90% of large-employee companies like Hobby Lobby will find it financially and administratively advantageous to follow precisely this course, terminating their group health plans, paying the no-plan tax, and sending their employees to the exchanges to purchase individual and family health insurance policies with subsidies. Michael G. Thompson et al., *The Affordable Care Act Could Shift Health Care Benefit Responsibility Away from Employers, Potentially Saving S&P 500 Companies $700 Billion*, MARKET INTELLECT (2014), *archived at* http://perma.cc/SJH9-28BR.

[69] *See* Transcript of Oral Argument at 27, Burwell v. Hobby Lobby, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354 & 13-356) ("If [Hobby Lobby] take[s] away the health care insurance, they are going to have to increase wages to make up for that. And they're going to have to pay the $2,000 penalty on top of it . . . ."); *accord id.* at 29 ("What I'm pointing out, though, is for purposes of the substantial burden analysis, it is perfectly appropriate to take into account the 2,000—the $26 million in fines they would pay [based on 13,000 employees] would not be the only thing that they would lose out if they are on that horn of the dilemma. They would also lose out all the additional wages they would have to pay . . . .").

Counsel also argued that Hobby Lobby's religious beliefs required it to provide employee health insurance coverage, *see id.* at 27–29, but this seems unlikely. While an employer might plausibly claim a religious obligation to ensure that its employees have adequate health insurance, it seems implausible that any employer could sincerely assert a religious requirement that it *and no one else* provide that insurance, as Justices Ginsburg and Kagan suggested. *See id.* at 28–29. In any event, the majority accepted this claim without any attention to or discussion of its precise content, let alone the sincerity with which it was made. *See Hobby Lobby*, 134 S. Ct. at 2776–77.

[70] Transcript of Oral Argument at 28, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354 & 13-356) ("I think there would still be a substantial burden on [Hobby Lobby's] [religious] exercise. . . . I'd love to have the opportunity to show how by not providing health

It is well documented that failure to cover approved contraceptives in an employer health plan imposes significant out-of-pocket costs on employees, who then have to pay for the excluded contraceptives with after-tax wages instead of having them fully covered by insurance that they pay for only in part and with pre-tax wages.[71] Such expenses can be substantial. For example, the $1,000 upfront cost of an intrauterine device—the most effective form of contraception and one to which Hobby Lobby objects—is a serious financial obstacle to lower-income employees.[72]

So according to counsel, RFRA should be read to protect a multi-billion dollar corporation against a marginal increase in its operating expenses as the cost of observing its religious beliefs against IUDs and other emergency contraception,[73] but not to prevent the same corporation from shifting the costs of that observance onto lower-income employees and dependents who believe and practice differently. How much credence, really, does such a callous claim deserve?

Quite a bit, it turns out—the majority accepted it. Though the government did not raise or rely on the argument that Hobby Lobby could have avoided the religious burden of the Mandate by terminating its health plan,[74] the majority reached out to criticize the substantive merits of this argument, albeit in dicta.[75] The majority flatly rejected the possibility that terminating its plan and paying the no-plan tax eliminated any substantial burden on Hobby Lobby's anti-contraception beliefs,[76] agreeing with counsel that implementing this choice might increase Hobby Lobby's net employee compensation expenses: "[I]t is far from clear that the net cost to the companies of providing insurance is more than the cost of dropping their insurance plans and paying the ACA penalty . . . [and] that it would be financially advantageous for an employer to drop coverage and pay the penalty."[77]

The majority, in other words, apparently believed that RFRA protects Hobby Lobby from *any* increase in its operating costs as compared to the *status quo ante* predating the Mandate, unless the government can satisfy strict scrutiny.

Because the majority assumed that expanding the religious nonprofit accommodation would still provide employees of exempted employers with

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insurance it would have a huge burden on my client and their ability to attract workers, and that in fact would cost them much more out of pocket.").

[71] *See, e.g.*, Brief for Guttmacher Inst. et al. as Amici Curiae Supporting the Government at 15–18, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354, 13-356), *archived at* http://perma.cc/55N-ENN7; Gedicks & Van Tassell, *supra* note 25, at 376–79.

[72] Brief for Guttmacher Inst. et al., *supra* note 71, at 18–20; *see also Hobby Lobby*, 134 S. Ct. at 2800 (Ginsburg, J., dissenting) (observing that "the cost of an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage").

[73] *See America's Largest Private Companies List*, *supra* note 67 (estimating Hobby Lobby's 2013 revenue at $3.3 billion with 10% annual growth).

[74] *Hobby Lobby*, 134 S. Ct. at 2776–77.

[75] *Id.* at 2776.

[76] *Id.* at 2777.

[77] *Id.* at 2776–77.

the mandated contraceptives at no cost, it saved itself from the awkward task of explaining why Hobby Lobby's employees should bear costs generated by Hobby Lobby's anti-contraception beliefs when Hobby Lobby is neither willing nor (apparently) obligated to bear any of them itself. Instead, the majority's silence suggested that Hobby Lobby employees would not be burdened even if they never receive the mandated contraceptives at no cost. Though it conceded, as it must, that balances under RLUIPA (and thus also RFRA) must "take account" of burdens on third parties,[78] it nevertheless maintained that no such burdens exist when third parties are merely deprived of a benefit which government has directed the religious claimant to supply to another private party.[79] Otherwise, the majority warned, the government could require Muslim-owned supermarkets to sell alcohol (for the convenience of customers), or require orthodox Jewish-owned restaurants to remain open on Saturday (to allow their nonorthodox waiters to earn tips),[80] though the majority neglected to explain how indulging individual preferences about where to purchase alcohol or when to earn tips could possibly constitute a "compelling" government interest even in the bizarre world the majority conjured up.

The majority's sophistry reads third-party burden analysis completely out of RFRA, RLUIPA, and the Constitution itself. Virtually every law and regulation in the for-profit workplace directs one private party (usually the employer) to provide a benefit to another (usually the employee). The Fair Labor Standards Act directs employers to provide employees the benefits of limited hours and minimum pay;[81] the Occupational Safety and Health Act directs employers to provide employees the benefit of a safe working environment;[82] Title VII of the Civil Rights Act directs employers to provide existing and prospective employees the benefits of an employment market and a work environment free of race, gender, religion, national origin, and disability discrimination;[83] the Employee Retirement Income Security Act directs employees to supply employees the benefits of safe and stable retirement and insurance compensation;[84] the list is almost endless. If it were possible to re-characterize third-party burdens as mere "unreceived benefits"

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[78] *Id.* at 2781 n.37 ("It is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.' ") (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005)).

[79] *Id.* at 2781 n.37 ("[I]t could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties.").

[80] *Id.*

[81] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012).

[82] Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2012).

[83] Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012).

[84] Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1191c, 1201–1242, 1301–1461 (2012).

that do not trigger limits on RFRA exemptions, then third-party burdens could never prevent RFRA exemptions.

The majority thus ignored the fact that the Court's Free Exercise Clause, Establishment Clause, and Title VII precedents are uniformly to the contrary. Shifting the costs of observing one's religion to others who do not believe or practice it has always been legally problematic in the for-profit workplace.[85] The Supreme Court has held, for example, that neither the Free Exercise Clause nor Title VII requires exemptions in the for-profit workplace when they would impose more than trivial burdens on third parties.[86]

More importantly, the Court has held that when "permissive" religious exemptions like RFRA—that is, accommodations of religion not constitutionally required by the Free Exercise Clause—shift the burdens of observing a religion from those who practice it to those who don't, such exemptions violate the Establishment Clause.[87] It is easy to see why and how. The classic eighteenth-century establishment of religion imposed tax burdens and legal disabilities on nonmembers that it did not impose on members; among other things, the Establishment Clause was meant to eliminate the practice of making some pay for the religious obligations and observances of others.[88] An important dimension of the Founders' understanding of religious liberty, therefore, was the freedom to make one's own choices about religion and religious belief, with whatever costs those entail, without also bearing the costs of religious choices made by others.[89]

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[85] *See* Gedicks & Van Tassell, *supra* note 25, at 359–61.

[86] *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985) (denying exemption to religious organization from minimum wage and reporting requirements of Fair Labor Standards Act because exemption would give competitive advantage to competitors and depress employee wages); United States v. Lee, 455 U.S. 252 (1981) (denying exemption from payment of social security taxes on employees to Amish employer with religious objections to social welfare programs, because exemption would deprive employees of social security benefits); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (holding that Title VII does not require employer accommodation of employee religious practices where the cost of such accommodation in terms of burdens on employer and other employees would be more than "*de minimis*").

Even decisions that mandated accommodation under the pre-*Smith* Free Exercise Clause betrayed a concern with the costs religious accommodations might impose on others. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 204, 208 (1972) (observing that exemption of Amish children from school attendance statute would not cause "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare"); Sherbert v. Verner, 374 U.S. 398, 409 (1963) (observing that exemption of Sabbatarian from Saturday work requirement of unemployment compensation regime would not "abridge any other person's religious liberties").

[87] *See* Cutter v. Wilkinson, 544 U.S. 709 (2005) (rejecting facial attack on institutionalized persons component of RLUIPA, by construing both statute and Establishment Clause as requiring that courts take account of burdens on nonbeneficiaries in issuing RLUIPA exemptions); Estate of Thornton v. Caldor, 472 U.S. 703 (1985) (holding state statute giving employees absolute right not to work on their day of worship violated Establishment Clause because of burdens it imposed on employers and other employees).

[88] *See* Gedicks & Van Tassell, *supra* note 25, at 362.

[89] *See id.* at 363.

Opponents of the Mandate dismiss these precedents and ignore Establishment Clause history altogether, suggesting instead that because religious accommodations "almost always" impose costs on others, this cost-shifting cannot be constitutionally problematic if the government is generally free to accommodate religion.[90] In one sense the critics are correct: religious accommodations often come with third-party costs, however diffuse. Professor DeGirolami, for example, has asserted that exemptions from anti-peyote and compulsory schooling laws impose "social costs of various kinds on third parties."[91] But "social costs" by definition are fully distributed throughout society (or a very large segment of it), and do not entail the constitutionally problematic cost-shifting that occurs when for-profit employers exempted from the Mandate deny their employees its considerable financial benefits. Rather, the Establishment Clause prohibits permissive religious accommodations whose costs are focused on a relatively small group of identifiable persons.[92]

This distinction can be illustrated by a hypothetical drawn from CVS Pharmacy Corporation's recent abandonment of the profitable sale of tobacco products in an effort to promote public health.[93] Though the move will cost CVS $2 billion in sales in the short term, in the long run analysts expect it to make up the loss through positive rebranding and new revenue sources opened up by the new policy.[94] In any event, the action drew praise from the Obama administration, and a number of commentators observed that the administration's enthusiastic embrace of CVS's exercise of its secular corporate conscience starkly contrasted with the administration's refusal to afford

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[90] *See, e.g.*, Marc DeGirolami, *The Deeper Meaning in the* Hobby Lobby *Opinion*, Library of Law & Liberty (July 1, 2014), http://www.libertylawsite.org/2014/07/01/the-deeper-meaning-in-the-hobby-lobby-opinion, *archived at* http://perma.cc/B8F5-PSR3 ("[E]xemptions—religious and otherwise—almost always impose burdens on others, burdens that harm others' interests in some way. . . . To say that the American tradition of religious freedom forbids exemptions that impose any harms on others is tantamount to saying that it forbids exemptions, period, other than those that cost nothing.").

[91] Marc DeGirolami, *On the Claim That Exemptions from the Contraception Mandate Violate the Establishment Clause*, Center for Law & Religion Forum (Dec. 5, 2013), http://clrforum.org/2013/12/05/on-the-claim-that-exemptions-from-the-contraception-mandate-violate-the-establishment-clause, *archived at* http://perma.cc/S4EX-A4WM.

[92] *Cf.* Frederick Mark Gedicks & Andrew Koppelman, *The Costs of the Public Good of Religion Should be Borne by the Public*, 67 Vand. L. Rev. En Banc 185, 186 (2014) (analogizing the *Hobby Lobby* exemption to a taking of private property for public use without compensation, because it focuses the costs of exemption on Hobby Lobby employees rather than spreading that cost throughout all of society as government compensation for a taking would).

[93] *See, e.g.*, Rachel Abrams, *CVS Stores Stop Selling All Tobacco Products*, N.Y. Times, Sept. 3, 2014, *archived at* http://perma.cc/3EFB-V25V; Bruce Japsen, *CVS Stops Tobacco Sales Today, Changes Name To Reflect New Era*, Forbes, Sept. 3, 2014, *archived at* http://perma.cc/4SPJ-Q8QA; Timothy W. Martin & Mike Esterl, *CVS to Stop Selling Cigarettes: Pharmacy Chain Says Tobacco Products Don't Fit with Push as Health-Care Provider*, Wall St. J., Feb. 5, 2014, *archived at* http://perma.cc/S47J-KXG3.

[94] *See* sources cited *supra* note 93.

Hobby Lobby any protection for its exercise of corporate religious conscience.[95]

Suppose instead that the revenue loss was not expected to be offset elsewhere, and that CVS had sought to make up the lost profits by withholding from each employee's paycheck his or her per-capita share of the loss. Such a move would have been unjust, as well as illegal. The lost profits would have been forcibly extracted from persons who had no voice in adopting the new policy, and no claim to prior profits or responsibility for future losses. Meanwhile, CVS's shareholders, who possess a profits interest and who ultimately control the operation of the corporation, would have borne none of the financial cost of the policy eliminating tobacco sales.

As outrageous as this hypothetical assessment would have been, it is essentially what Hobby Lobby threatens. In the absence of a fully funded and implemented for-profit accommodation, Hobby Lobby's employees would be forced to pay the costs of Hobby Lobby's observance of its anti-contraception beliefs, beliefs that employees may not themselves hold or observe, by having to pay out of pocket with after-tax wages for contraceptives and related services that should be fully covered by their health plan. The *Hobby Lobby* exemption functions like a tax or assessment imposed on Hobby Lobby employees to facilitate the exercise of their employer's religion. This kind of exemption, imposing material burdens on identifiable third parties, is prohibited by the Establishment Clause, and thus the government's constitutional obligation to avoid imposing such burdens constitutes a compelling interest that satisfies strict scrutiny.[96]

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[95] *See, e.g.*, Ronald Colombo, *The Privatization of Religion*, THE CONGLOMERATE (July 17, 2014), http://www.theconglomerate.org/2014/07/the-privatization-of-religion-.html, *archived at* http://perma.cc/5B64-AJ48; Brett G. Scharffs, *Our Fractured Attitude Towards Corporate Conscience*, SOCIAL SCIENCE RESEARCH NETWORK (Mar. 12, 2014), http://ssrn.com/abstract=2445680.

[96] It is possible, of course, that in the absence of new offsetting revenues, CVS's elimination of tobacco sales might eventually eliminate some employee jobs, and in this sense impose the costs of the policy on employees who lose their jobs. CVS's loss of revenues from tobacco sales, for example, might require a reduction in its workforce, though immediate layoffs are unlikely, and might not ever occur. Like most businesses, CVS would probably look first to reduce employment by attrition, simply not replacing workers who retire, voluntarily resign, or are terminated for reasons unrelated to the policy. If further reductions were required, employees might also be offered transfers to stores less impacted by the policy. In short, the risk of losing one's job as a result of the policy is shared by all workers ex ante; when combined with all the other factors that might result in a loss of employment, the risk of losing it because of CVS's decision to eliminate tobacco sales is probably not material. Even in the absence of new offsetting revenues, therefore, the costs of CVS's policy are likely to be largely absorbed by its shareholders.

Rebecca Van Tassell and I made a similar argument with respect to the risk of being involuntarily inducted into the military as the result of the government's exemption of religious pacifists from the draft. *See* Gedicks & Van Tassell, *supra* note 25, at 363–64, 372.

If there is any silver lining to the cloud *Hobby Lobby* has cast over the liberty of employees to be free from paying for their bosses' religion,[97] it is that five Justices expressly recognized that RFRA does not authorize permissive religious exemptions that shift the costs of observing a religion from those who practice and believe it to those who do not. The four dissenting Justices expressly endorsed the principal that such burden-shifting exemptions mark a limit on judicial authority to grant RFRA exemptions:

> The Court ultimately acknowledges a critical point: RFRA's application *must* take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries. No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect.[98]

Justice Kennedy, the crucial fifth vote needed to make the *Hobby Lobby* majority, was just as emphatic on this point:

> Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.[99]

Even the majority grudgingly acknowledged that the burdens that a RFRA accommodation might impose on nonbeneficiaries "will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest."[100]

In short, though for-profit businesses may not be required to shoulder additional costs to observe both the law and their religious beliefs after *Hobby Lobby*, neither will they be permitted to shift the existing costs of that observance to employees who do not believe or practice the employer's religion. Avoiding RFRA exemptions that impose the costs of an employer's

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[97] *See* Frederick Mark Gedicks, *Paying for the Boss's Beliefs*, WASH. POST, Jan. 20, 2014, at A15.

[98] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2801 (2014) (Ginsburg, J., dissenting) (internal quotation marks & citations omitted); *see also id.* at 2790 ("Accommodations to religious beliefs or observances [under the Free Exercise Clause], the Court has clarified, must not significantly impinge on the interests of third parties.").

[99] *Id.* at 2786–87 (Kennedy, J., concurring); *accord* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 722 (1994) (Kennedy, J., concurring) ("[A] religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or so discriminate against other religions as to become an establishment.").

Permissive accommodations of churches and religious nonprofit organizations pose a different case for third-party burden analysis. *See, e.g.*, Corp. of the Presiding Bishop v. Amos 483 U.S. 327 (1987) (holding that Title VII exemption for "religious organizations" does not violate Establishment Clause).

[100] *Hobby Lobby*, 134 S. Ct. at 2781 n.37.

religious practices on its employees is either an internal limit on judicial power to grant such exemptions—that is, a government interest that satisfies RFRA strict scrutiny,[101] as stated by five members of the Court and conceded even by the majority,[102] or an external limit on such power—that is, a constitutional limitation on RFRA represented by the Establishment Clause.[103]

Conclusion: Taking Third-Party Burdens Seriously

Hobby Lobby answered each of the three questions raised by counsel at oral argument:

1. When a court applies strict scrutiny under RFRA, a proposed alternative to religiously burdensome government action need not be financially, politically, or otherwise viable for it to qualify as an "available" less restrictive means of accomplishing the government's goals;[104]

2. Whatever may have been the intention or understanding of Congress in 1994, the strict scrutiny now required by RFRA is not the deferential test of pre-*Smith* free exercise doctrine, but the much more stringent test used in free speech, due process, and equal protection cases;[105] and

3. The need to avoid imposing burdens on those who do not believe or adhere to the exempted religious practice constitutes a justification for denying exemptions that satisfy strict scrutiny under RFRA.[106]

Hobby Lobby dramatically expanded the strength and reach of RFRA, by enabling religious exemptions on the basis of alternatives that are practically unavailable to implement even compelling government interests, and by requiring genuinely strict judicial scrutiny of religiously burdensome government actions. This unprecedented expansion of permissive accommodation doctrine belies the majority's assertion that it has not created a religious "opt-out" from generally applicable legislation. At the same time, it will often be the case that a claimed exemption will entail significant costs to third parties and thus should not be permitted even under RFRA. Third-party burdens caused by RFRA exemptions, therefore, set a meaningful and necessary limit on the newly expanded power of the courts to grant religious exemptions from generally applicable laws.

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[101] *See* Kara Lowentheil, *When Free Exercise Is a Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 Drake L. Rev. 433, 499–501 (2014).
[102] *See supra* notes 98–100 and accompanying text.
[103] *See* Gedicks & Van Tassell, *supra* note 25, at 349.
[104] *See supra* Part I.
[105] *See supra* Part II.
[106] *See supra* Part III.